

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK NIGEL ATKINS,

Defendant-Appellant.

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UNPUBLISHED

March 3, 2009

No. 281377

Wayne Circuit Court

LC No. 07-008940-01

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of armed robbery, MCL 750.529, assault with intent to commit armed robbery, MCL 750.89, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to prison terms of 15 to 30 years for the armed robbery and assault-with-intent-to-commit-armed-robbery convictions, and two to five years for the felon-in-possession conviction. He also received a mandatory two-year sentence for the felony-firearm conviction. For the reasons set forth below, we affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt the essential elements of armed robbery, assault with intent to commit armed robbery, felon-in-possession, and felony-firearm. We disagree.

“This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial.” *People v Lanzo Constr Co*, 272 Mich App 470, 473-474; 726 NW2d 746 (2006). “The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.* “Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime.” *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

The prosecution established defendant’s identity as one of two armed robbers on the basis of circumstantial evidence. Police officers recovered a yellow and black cellular phone from the scene of the crime. Officers traced a “home” number stored in the phone to the residence of defendant. The prosecution also established that a customer struck a blow to one perpetrator’s face. At the time of arrest, defendant had an injury to his left eye.

The elements of armed robbery are: (1) an assault, (2) accompanied by a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon. *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). An assault "requires proof that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Watkins*, 247 Mich App 14, 33; 634 NW2d 370 (2001).

The evidence presented at trial showed that defendant pointed a gun at the cashier's chest and demanded money. The cashier placed the contents of the register on the counter. Defendant refused the money and demanded the contents of the safe located in the rear of the store. Defendant held the cashier at gunpoint throughout the robbery. Consequently, the cashier complied with defendant's request to be led to the safe, and testified as follows:

Q. Okay. When you got inside [the office], did you have—say anything to [the supervisor] or did the taller individual [defendant] say something first?

A. No. I spoke first.

Q. What did you say?

A. I told [the supervisor] to open the safe.

Q. Okay, why did you do that?

A. Because the guy had a gun in my back. He wanted it. Told me [to] go to the safe.

We conclude that when defendant threatened the cashier with the gun, defendant placed the cashier in reasonable apprehension of being shot if he failed to comply with defendant's demands. As a result, defendant committed an assault, *id.*, the first element of armed robbery.

The second element, "a felonious taking from the victim's presence or person," was established through an aiding-and-abetting theory. The proofs established that defendant aided and abetted his accomplice in taking property belonging to the CVS store in the immediate presence of its employees. To convict a defendant of armed robbery as one who has aided and abetted, the court must determine that

"(1) the [armed robbery] charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the [armed robbery], and (3) defendant intended the commission of the [armed robbery] or had knowledge that the principal intended its commission at the time that he gave aid and encouragement." [*Akins*, 259 Mich App at 555 (citation omitted).]

As an initial matter, we note that the record in this case does not establish with certainty whether the other gunman was ever apprehended or whether his identity was ever discovered. However, undisputed testimony implicated another gunman in this case, and the proofs established that defendant cooperated with this accomplice in committing the instant offenses.

We conclude that there was sufficient evidence presented in this case for the trial court to find beyond a reasonable doubt that defendant aided and abetted an accomplice, despite the fact that the accomplice was never identified by name. See *People v Wilson*, 196 Mich App 604, 611; 493 NW2d 471 (1992).

Furthermore, we conclude that there was also sufficient evidence for the trial court to find beyond a reasonable doubt that defendant materially assisted the accomplice in the felonious taking of property from the store and its employees. The testimony established that defendant's accomplice took the money from the counter and filled a garbage can with the money and cigarettes. This undisputedly constituted a felonious taking. The evidence further showed that defendant "performed acts or gave encouragement that assisted the commission" of this felonious taking by pointing a silver revolver at employees and customers and making demands for money. *Akins*, 259 Mich App at 555. For instance, the cashier testified as follows:

Q. Did either [perpetrator] approach you?

A. Yes.

Q. Which one?

A. The taller, slender guy.

Q. What, if anything, did that person do with the gun or say to you?

A. He held the gun up, told us—[there were] other customers in the store at the time. He told me, the other customers to remain calm, everything would be all right. He said that, you know, I already know the procedure. He told me to follow the procedure.

Consequently, defendant created the opportunity for his accomplice to gather the money, cigarettes, and other property by holding the employees and customers at bay with his gun. There was sufficient evidence for the trial court to determine beyond a reasonable doubt that defendant's acts were completed as a means to bring about the armed robbery of the CVS store.

Lastly, concerning the final element of the offense of armed robbery, the evidence established that defendant was armed with a silver revolver. Indeed, officers later recovered the revolver from the CVS store. Defendant was properly convicted of armed robbery of the store cashier.

We further conclude that defendant was properly convicted of assault with intent to commit armed robbery with respect to the store supervisor. The elements of assault with intent to commit armed robbery are: (1) the commission of an assault with force and violence, (2) an intent to rob or steal, and (3) the defendant's possession of a dangerous weapon. *Id.* at 554. "[T]here must be evidence that the defendant intended to rob or steal." *Id.* (citation omitted).

Defendant's acts, which established an assault with respect to the cashier as discussed above, also established an assault with respect to the store supervisor, who testified as follows:

Q. Okay. When [the cashier] came into the office what did you do? Did he ask anything of you?

A. Yes.

Q. What was that?

A. Open the safe.

Q. Okay. You said you didn't see too much of the person. Did you see that the person who had his face covered at least had a gun?

A. Yes.

Q. Okay. What did you do once [the cashier] asked you to open the safe and you saw the gun?

A. Got up, and went towards the safe.

This evidence amply established that defendant forced the supervisor to open the safe by placing her in reasonable apprehension that she would be shot if she did not comply.

The evidence also established that defendant intended to rob the store supervisor in her capacity as an agent of the CVS store. Although defendant did not demand money or personal belongings from the customers, he pressed the silver revolver against one of the store employees, ordered all employees and customers into the store's back office, and demanded money from the store's safe. As noted, defendant was armed with a revolver throughout the entire criminal episode. We conclude that there was sufficient evidence presented at trial from which the court could have found beyond a reasonable doubt that defendant committed assault with intent to commit armed robbery with respect to the store supervisor. *Id.*

In *People v Perkins*, 473 Mich 626, 629; 703 NW2d 448 (2005), our Supreme Court discussed the elements of the offense of felon-in-possession:

[MCL 750.224f] makes it a crime for a person who has been convicted of a 'specified felony'—one that either involves a substantial risk of, or contains as an element the threatened, attempted, or actual use of, physical force against a person or property—to possess a firearm until that person has had the right to possess a firearm restored . . . .

The parties stipulated that defendant had a prior felony conviction, thus making him ineligible to lawfully possess a gun. Further, defendant possessed a firearm during the commission of the instant felonies. The evidence presented at trial was sufficient to sustain defendant's conviction of felon-in-possession. *Id.*

"To be guilty of felony-firearm, one must *carry or possess* [a] firearm, and must do so *when* committing or attempting to commit a felony." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in original). Several witnesses testified that defendant was armed with a silver revolver. Defendant pointed the gun at the cashier's chest and back.

Defendant also pressed the gun to the cashier's side while demanding that the safe be opened. After being punched by a customer, defendant wrestled with the customer for control of the gun, causing the gun to fire once. Defendant was ultimately overtaken by the customer and fled, leaving the customer in possession of the gun. The entire ordeal was captured on the store's video surveillance tape. This evidence amply established that defendant was in possession of a firearm during the commission of the instant felony offenses.

Defendant also argues on appeal that the trial court's verdict was contrary to the great weight of the evidence. Again, we disagree. A verdict is against the great weight of the evidence only if it can be said that "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008); see also *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998).

After review of the record in this case, we cannot conclude that any of the testimony was severely impeached or inherently implausible. Therefore, we must leave the test of credibility where our system reposes it—"in the trier of fact." *Id.* at 646. The defense sought to establish that defendant suffered an injury to his left eye while fighting his brother the previous week. But the court accepted the prosecution's theory that defendant was "orchestrating an [alternate] explanation" for his injury through telephone and written communications with his brother and other witnesses. The trial court was in the best position to assess the credibility of the witnesses who appeared before it. *Id.*

The trial evidence weighed heavily against defendant in this case. Although much was circumstantial, the evidence also included testimony of the cashier, the supervisor, three customers held hostage during the robbery, several police officers, a familiar acquaintance of defendant's brother, and defendant's brother himself. Non-testimonial evidence included a yellow and black Nextel cell phone, a silver revolver, the injury to defendant's left eye, and a video surveillance recording of the robbery. In short, we reject defendant's claim there was a "lack of eyewitness testimony." The cashier, the supervisor, and three customers all provided consistent eyewitness testimony concerning key facts such as the height and build of the perpetrators. One customer even engaged in a physical confrontation with defendant and described the events just as they were depicted on the video surveillance tape. The trial court's verdict—finding defendant guilty of armed robbery, assault with intent to commit armed robbery, felon-in-possession, and felony-firearm—was not contrary to the great weight of the evidence.

Affirmed.

/s/ Kathleen Jansen  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood